

NO. 43559-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AARON L. RAYGOR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Beverly G. Grant, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Trial counsel rendered ineffective assistance by failing to object to a police officer's opinion testimony.

Issue Pertaining to Assignment of Error

Did trial counsel render ineffective assistance by failing to object to a police officer's opinion on guilt?

B. STATEMENT OF THE CASE

When Julia Mullan returned to her Graham home in the late afternoon of May 2, 2011, she saw the doors had been kicked in. Her daughter, who had arrived a few minutes earlier, called police. RP 179-81. Ms. Mullan also called her husband, Gary Mullan. RP 170-72. Officers arrived within about 20 or 30 minutes and confirmed it was safe to go inside. RP 173-74, 181.

In addition to the broken doors, a bedroom window had been broken. RP 172-73. The interior of the home was ransacked and television sets and other items had been taken. RP 174, 182. A police officer searched several areas for fingerprints without success. RP 52-58. The officer instead noticed a pattern on several items that was consistent with the use of gloves. RP 57-58.

At around noon the following day, Aaron Raygor tried to buy merchandise with Gary Mullan's credit card at an area Target store. The transaction was denied. RP 103, 106, 222-23. The incident was captured by the store's video surveillance system, burned to disk and provided to the police. RP 102-04, 221-23. The transaction was also recorded on paper. RP 223-24.

At about 4 p.m. that same day, Hayward Brandon was in his Graham home when he heard an alarm go off at the Bicheray home across the street. RP 134-35, 154. He looked out the window and saw a man run from the front door of the home to the driver's side of a white Cadillac parked in the driveway about 25 feet away. Brandon ran downstairs while dialing 911, but could not see the license plate number of the car because it sped away. RP 135-37. He described the car and its direction of travel to the 911 operator. RP 137.

Brandon walked across to the Bicheray home and saw the front door was standing open. He also walked around to the side of the house and observed a smashed window. RP 137-38. A police officer arrived within about 15 or 20 minutes and Brandon told him what he had seen. RP 132-33, 137. According to the officer, Brandon told him a light-skinned black man ran from the house to the car. RP 257.

Sandy Bicheray received a call at work to come home, and met with a police officer when she arrived. RP 132-33, 152-55. There was a broken window to the laundry room. RP 155-57. Ms. Bicheray inspected the inside of her home. An engraved jewelry box and its contents were missing from her bedroom. RP 157-61.

Shortly after Brandon's description was broadcast, a police officer stopped a white Cadillac that was seen fleeing the scene of the incident at Ms. Bicheray's home. RP 31-33, 85. Officers removed Raygor from the driver's seat, another man from the passenger's seat, and a woman from the rear seat. RP 33-34. There was some loose jewelry on the passenger's seat and a screw driver tucked beside the driver's seat. RP 39, 196-97. The men wore what appeared to be "high dollar watches," as well as tennis bracelets and several rings. RP 39. Officers photographed the jewelry, removed it from the men's wrists and fingers, and placed each item in corresponding packages. RP 87.

Officer Anthony Filing searched the impounded Cadillac. RP 90-93. Filing found Ms. Bicheray's jewelry box and several pieces of jewelry, which he returned to her. RP 94, 98-101, 157-62.

A few days later, Filing learned about the credit card incident. RP 102. He obtained the Target surveillance video and still photos from the

video. According to Filing, the evidence depicted Raygor attempt to use the credit card, walk out into the parking lot and get into the same white Cadillac. RP 103-04.

Filing searched the car again about a week later, on May 12. RP 101. This time he recovered rubber gloves, a bag of Mr. Mullan's tools, and a piece of paper on which was written Mr. Mullan's name, birth date, Social Security number, and address. RP 109-11, 175-77. Mr. Mullan said the writing on the paper was not his. RP 175.

Filing also found a camera belonging to the Mullans' daughter. RP 113-14, 192. He photographed six photographs stored on the camera. RP 114-15, 193, 195-96. Ms. Mullan recognized her daughter's shirt in one of the images, but none of the people depicted therein. RP 193.

Armed with this information, the State charged Raygor with residential burglary of Ms. Bicheray's home and identity theft regarding Mr. Mullan. CP 5-7.¹

David Turner was the passenger in the Cadillac when police stopped it. RP 258, 271. As a result of the incidents, he pleaded guilty to

¹ The State also charged residential burglary of another home. CP 5-6. The jury found Raygor not guilty. CP 46. The State also charged attempted residential burglary of a different home, but dismissed the charge during trial. RP 255-56.

"two crimes of dishonesty." RP 272. Turner testified he owned the Cadillac and all of its contents. Raygor was an acquaintance. RP 259. Because Raygor had a driver's license and Turner did not, he asked Raygor to drive the day they were arrested. Turner testified he did not want to be pulled over with stolen items in the car. 2RP 259, 277.

Turner did not tell Raygor about what he planned to do or why they were going to Ms. Bicheray's home. 2RP 272, 274. The woman who was with them, Andrea Nelson, knew about the plan. 2RP 266, 271-72. Raygor parked in Ms. Bicheray's driveway and stayed in the car while Turner went around the side and got in through a broken window. RP 266, 274. He stole a jewelry box and handed it back to Nelson in the back seat when he returned to the car. RP 271, 273, 275. Turner said he was already coming out of the front door of the house when the alarm sounded. RP 273-75. He said Raygor seemed surprised when police pulled him over. RP 276, 278.

The photos taken from Mullans' camera depicted Turner and two women, Lea and Vanessa. RP 266-68. Another man was in a photo, but Turner could not identify him. RP 268. Nor did he recall when the photos were taken. RP 267, 269.

Turner did not remember going to Target on the day he was arrested. After watching the video from the outside camera, Turner recognized himself sitting in the front seat of his car but could not tell who the other man was. RP 261-62. Nor did he recognize the man depicted on the video inside the store. RP 263.

During closing argument, the prosecutor contended Raygor was an accomplice to Turner's residential burglary of the Bicheray home. RP 294-97. The prosecutor also argued Raygor tried to use Mullan's credit card at Target. RP 304.

As for the burglary, Raygor's counsel argued none of the missing items were found on the driver's seat and none were associated with Raygor. RP 313-14. He argued Raygor's surprise at being pulled over was consistent with Turner's testimony he knew nothing about a burglary. RP 315-16.

The jury found Raygor guilty of residential burglary and second degree identity theft. CP 45, 47. The trial court imposed an exceptional sentence of 108 months for the burglary and a concurrent standard range sentence of 54 months for identity theft. CP 52-64²

² The court accepted the State's recommendation, which was based on Raygor's offender score of 13. The State cited RCW 9.94A.525(2)(c), which authorizes a trial court to exceed the standard range where it finds

C. ARGUMENT

1. RAYGOR RECEIVED INEFFECTIVE REPRESENTATION BECAUSE TRIAL COUNSEL FAILED TO OBJECT TO ADMISSION OF A POLICE OFFICER'S OPINION ON GUILT.

Officer Filing testified he recognized Raygor as the suspect shown on still photos made from the Target surveillance video entering and leaving the store, as well as attempting to use the stolen credit card. RP 103. The still photos and video were later admitted as exhibits during trial. RP 223-27; Exs. 44-52, 54-B, 54-C. Filing's testimony was an improper opinion on guilt under ER 701; it was up to the jury to examine the photos and determine whether Raygor resembled the suspect. Trial counsel's failure to object to Filing's opinion was deficient performance that prejudiced Raygor's constitutional right to a fair trial.

a. Ineffective assistance test

Article I, section 22 and the Sixth Amendment guarantee criminal defendants effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). Defense

"[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RP 353-56, 359.

counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Prejudice occurs if, absent the deficient performance, it is reasonably probable the verdict would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Failing to object to admission of evidence constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. State v. Fortun-Cebada, 158 Wn. App. 158, 172, 241 P.3d 800 (2010); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

b. Lay opinion testimony regarding identity

A witness must testify based on personal knowledge, and a lay witness may give opinion testimony if it is (1) rationally based on the witness' perception, and (2) helpful to a clear understanding of the testimony or the fact in issue. ER 602, 701; State v. George, 150 Wn.

App. 110, 117, 206 P.3d 697, review denied, 166 Wn.2d 1037 (2009). A lay witness may give an opinion as to the identity of a suspect shown in a surveillance photo "if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994), affirmed and remanded sub nom., State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996).

Such opinion testimony may be proper when the witness has had sufficient contacts with the person depicted in the photo or when the person has changed his appearance between the incident captured on the photo and trial. George, 150 Wn. App. at 118 (citing United States v. La Pierre, 998 F.2d 1460, 1465 (9th Cir.1993)).³

Courts have also considered the quality of the photographic evidence in considering whether lay witness opinion testimony is more helpful to the jury. See, e.g., Hardy, 76 Wn. App. at 191 (officer's identification of defendant on "somewhat grainy videotape" of drug transaction helpful to jury because officer had known defendant for several years and was familiar with his mannerisms and body movements); United

³ Because Federal Rule of Evidence is substantially the same as ER 701, federal cases are instructive. Hardy, 76 Wn. App. at 190.

States v. Stormer, 938 F.2d 759, 762 (7th Cir. 1991) (police officers' testimony identifying former officer as robber in surveillance photos helpful where officers had worked with defendant for several years, photographs were of poor quality and robber wore baseball cap and hosiery pulled over face).

As well, identification testimony by a law enforcement officer "is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution." United States v. Butcher, 557 F.2d 666, 670 (9th Cir. 1977). When there is other adequate identification evidence, neither a police officer nor any other witness may improperly reinforce or vouch for an eyewitness' credibility; such bolstering invades the jury's province. State v. Lazo, 209 N.J. 9, 24, 34 A.3d 1233, 1242 (2012).

c. Officer Filing's identification testimony was inadmissible.

Admission of evidence under ER 701 is reviewed for an abuse of discretion. State v. Brett, 126 Wn.2d 136, 162, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). Applying the above factors, the trial court would have abused its discretion by admitting Filing's identification testimony had defense counsel timely objected.

Filing did not have such extensive contacts with Raygor as to render his opinion helpful to the jury. Filing reported to the scene where Raygor had been pulled over. RP 85. He assisted Officer Ruder in collecting the items of jewelry taken from Raygor and Turner and placing them in bags according to who wore each. RP 87. He interacted with Raygor only at the scene. RP 89. Filing was thus not in a position superior to a juror to identify Raygor as the man depicted in the Target photos. See George, 150 Wn. App. at 119 (officer's observations of defendant George as he stepped out of van and ran away and later at the hospital, and of defendant Wahsise when he got out of van and was handcuffed, and while at the police station, not sufficient to support testimony identifying them as suspects on poor quality motel video).

Nor was there any evidence that Raygor changed his appearance between the time of his arrest and trial. Cf. United States v. Barrett, 703 F.2d 1076, 1086 (9th Cir. 1983) (trial court did not abuse discretion by admitting girlfriend's identification of defendant in bank surveillance photograph where defendant had full beard and mustache around time of robbery and was clean-shaven during trial); United States v. Ingram, 600 F.2d 260, 261 (10th Cir. 1979) (identification of defendant by two close acquaintances as one of two robbers depicted in surveillance photos

admissible where there was some evidence defendant's appearance had changed between time of robbery and trial).

The State also did not show the still photos or surveillance tape were of such poor quality that Filing's identification testimony was necessary. Furthermore, Target employee Mr. Tiger briefly interacted with Raygor at the time of the attempted credit card transaction and provided other adequate identification testimony such that Filing's identification was not necessary. RP 227-29.

Simply put, whether the person sitting before the jury was the one pictured in the surveillance photographs was a determination properly left to the jury. LaPierre, 998 F.2d at 1465. Filing invaded the jury's province by testifying the photos depicted Raygor. The trial court would have sustained a timely objection to the evidence.

d. The failure to object was not reasonably strategic.

Although it is presumed defense counsel's conduct is not deficient, a defendant sufficiently rebuts the presumption "where there is no conceivable legitimate tactic explaining counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Raygor satisfies that test here.

Identity of the perpetrator was the issue regarding the identity theft charge. As defense counsel aptly noted during closing argument, the police did not collect or make a note of Raygor's jacket and hat to compare it with the clothes worn by the person depicted in the Target still photos and video. Further, Mr. Tiger misidentified the make of Turner's Cadillac and did not seize the credit card from the person after confronting him at the store. RP 322-23.

Filing's identification testimony was crucial to the State's case. The testimony improperly bolstered Tiger's identification of Raygor. The decisions in George and Hardy issued long before Raygor's trial. Reasonable legal research would have led counsel to those cases and supporting authority. See State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776 ("Trial counsel owe several responsibilities to their clients, including the duty to research relevant law."), review denied, 171 Wn. 2d 1025 (2011).

- e. The verdict would have been different without the evidence.

When evidence is improperly admitted, the error is harmless if it is minor in reference to the overwhelming evidence as a whole. George, 150 Wn. App. at 119. Filing's identification testimony was not "minor" in reference to the other evidence. Only Filing told jurors that Raygor was

the suspect in the photos and video. The prosecutor was careful not to ask Tiger what the evidence depicted. See RP 226-27 (prosecutor asked whether still photos "appeared to be fair and accurate depictions of various spots in time of the surveillance").

Tiger made an in-court identification of Raygor as the Target suspect, but admitted his contact with the suspect was brief. RP 222, 228. The State did not call any other Target employees – such as the clerk who waited on Raygor at the cash register -- to corroborate Tiger's identification. Nor did Tiger seize the credit card, which could have been forensically tested. Tiger also improperly identified the make of the car as a Buick rather than a Cadillac. RP 230-31.

In addition, someone tried to use Mr. Mullan's credit card after Raygor and Turner had been detained at about 4 p.m. RP 30-35, 213-14. Finally, Filing was a veteran police officer who served as the investigator for his detachment with the Pierce County Sheriff's Department. His identification testimony therefore carried great weight. See State v. Farr-Lenzini, 93 Wn. App. 453, 465, 970 P.2d 313 (1999) (opinion expressed by sheriff or police officer may influence jury and thus deny accused right to fair trial.)

Under these circumstances, admission of the identification evidence was not harmless. Trial counsel's failure to object to the evidence was deficient performance that caused prejudice. Counsel's ineffectiveness should result in a reversal of the identity theft conviction and a remand for a new trial.

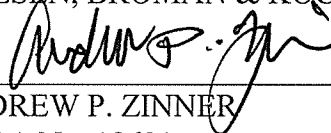
D. CONCLUSION

For the above reasons, this Court should reverse Mr. Raygor's identity theft conviction and remand for a new trial.

DATED this 28 day of November, 2012.

Respectfully submitted,

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